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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/673,406	03/29/2002	Leonard S. Schultz	6338.02 DEB	7188
25763	7590	10/03/2003	EXAMINER	TRUONG, LINH T
DORSEY & WHITNEY LLP INTELLECTUAL PROPERTY DEPARTMENT 50 SOUTH SIXTH STREET MINNEAPOLIS, MN 55402-1498			ART UNIT	PAPER NUMBER
			3761	

DATE MAILED: 10/03/2003  
AB

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.	Applicant(s)	
09/673,406	SCHULTZ ET AL.	
Examiner	Art Unit	
Linh Truong	3761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

1) Responsive to communication(s) filed on \_\_\_\_.

2a) This action is FINAL.      2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

4) Claim(s) 1-15 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_ is/are allowed.

6) Claim(s) 1-15 is/are rejected.

7) Claim(s) \_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.

    Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11) The proposed drawing correction filed on \_\_\_\_ is: a) approved b) disapproved by the Examiner.

    If approved, corrected drawings are required in reply to this Office action.

12) The oath or declaration is objected to by the Examiner.

### Priority under 35 U.S.C. §§ 119 and 120

13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some \* c) None of:

1. Certified copies of the priority documents have been received.

2. Certified copies of the priority documents have been received in Application No. \_\_\_\_.

3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) The translation of the foreign language provisional application has been received.

15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

### Attachment(s)

1) Notice of References Cited (PTO-892)

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) 3.

4) Interview Summary (PTO-413) Paper No(s) \_\_\_\_.

5) Notice of Informal Patent Application (PTO-152)

6) Other: \_\_\_\_.

## DETAILED ACTION

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-5, 8-10, and 12, are rejected under 35 U.S.C. 102(b) as being anticipated by Schultz et al. (Schultz) '4,921,492 (IDS).

For claims 1-4 and 8-10, Schultz teaches smoke evacuator 10 with a vacuum head 18 that includes a flat collector having a top wall 24, a bottom wall 26, and side walls 28 that form a generally annular, internal plenum 28. The top wall 24 includes access aperture 32 and the bottom wall includes access aperture 34 that is aligned with aperture 32. A clear film 38 is removably attached over the top access aperture 32 of the top wall. Bottom wall 26 has a first adhesive layer 40. Plenum 28 carries a plenum support 48 (fig. 1 and col. 1, lines 34-63).

For claim 5, Schultz teaches various shapes, and thus, different open facing sizes (fig. 1 and fig. 5).

For claim 12, Schultz teaches a flexible hose 16 (col. 2, line 25) and a soft, pliable collector 22 (col. 1, line 54).

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 6-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schultz et al. (Schultz) '4,921,492 in view of Griesbach et al. '6,055,987.

For claims 6-7, Schultz discloses the claimed invention except for having a malleable sheet material coupled to the smoke evacuation apparatus. Griesbach et al. teach a malleable drape/fabric that can be operably coupled to a smoke evacuation system (col. 11, line 66- col.12, line 2). Therefore it is obvious to one with ordinary skill in the art to provide the apparatus of Schultz with a drape for protecting the surgical area from contamination.

Claims 11 and 14-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schultz et al. (Schultz) '4,921,492 in view of Pizzella '3,604,421.

For claims 11 and 14-15, Schultz discloses the claimed invention (see the frist 102 b rejection) except for a removable portion. Pizella teaches an ostomy device with disc 12 and a size-adjustable drain opening surrounded by removable strips 14 with weakened lines in order to fit various sized stoma openings (figs. 1 and 2 and col. 1, lines 44-47) for more efficient drainage of bodily fluids. Therefore, it is obvious to one with ordinary skill in the art to provide the invention of Schultz with removable strips for

adjusting the size of the aperture for different sized areas for more efficient removal of smoke.

Claim 13 is rejected under 35 U.S.C. 103(a) as being unpatentable over Schultz et al. (Schultz) '4,921,492 in view of Folsom et al.

For claim 13, Schultz discloses the claimed invention except for using the apparatus in an enclosed vessel. Folsom et al. teach an enclosed anaerobic chamber/workstation with an outlet means 64 connected to a vacuum pump for suctioning out air (col. 6, lines 17-19). Therefore it is obvious to one with ordinary skill in the art to at the time the invention was made to provide Schultz's apparatus with an enclosed chamber to create a desired atmospheric environment by removing air/smoke from the enclosed chamber.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

**A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).**

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1, 8, 9, and 10 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 2, 3, and 4, respectively, of U.S. Patent No. 4,921, 492. Although the conflicting claims are not identical, they are not patentably distinct from each other because the patent claims are merely broader than the application claims. *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993).

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Linh Truong whose telephone number is 706-605-4974. The examiner can normally be reached on M-F 8:30am-5pm.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0858.

Linh Truong

\*\*\* *L.T.*

  
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